

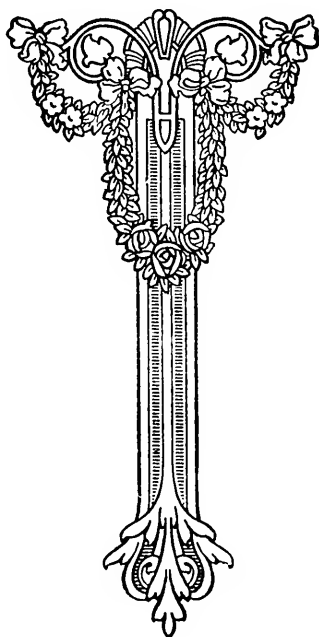
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SOME REMARKS
ON THE
HISTORY AND USES OF
POTOMAC PARK

BY
ALEXANDER B. HAGNER, A.M., LL.D.



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ON THE
History and Uses of Potomac Park

BY
ALEXANDER B. HAGNER, A.M., LL.D.
Associate Justice (retired)
Supreme Court of the District of Columbia



WASHINGTON, D. C.
PRESS OF W. F. ROBERTS COMPANY
1914

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Washington, D. C., July 16, 1914.

The Honorable Alexander B. Hagner,
Washington, D. C.

Dear Mr. Justice Hagner:—

We desire the opportunity of having printed in permanent form for the benefit of the future your recent address upon the history of the reclamation of the "Potomac Flats" and the establishment of Potomac Park. The important and honorable part which you took in that great project for the preservation of the water front of the National Capital for public uses, and especially for the benefit of the whole people as a public park, by your authorship of the opinion containing the judgment of the Supreme Court of the District of Columbia in General Term, in the celebrated Morris case, which, being affirmed by the Supreme Court of the United States, determined, forever, that "the rights of property and sovereignty over the river Potomac, with its shores and adjacent lands, devolved upon the United States as the common property of the people, to be used solely for public purposes for the benefit of the seat of government," made it especially fitting that you should deliver that address, and its character makes it appropriate that it should be published for the benefit of all who are, or shall be, interested in the development of the National Capital. Nothing in your distin-

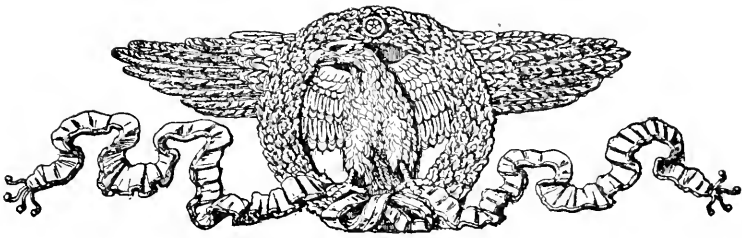
guished career can give you more pleasure than the service which you rendered in the Morris case to the Capital and the country, whose results shall endure for all time to come.

With appreciation of all your public service and particularly of the episode resulting in the creation of the Potomac Park, we beg leave to subscribe ourselves.

Very respectfully and sincerely yours,

Mahlon Pitney	Henry B. F. Macfarland
Geo. W. White	Charles E. Munroe
Robt. N. Harper	C. F. Bell
Thos. H. Anderson	Willis L. Moore
Allen C. Clark	Frank W. Hackett
W. F. Roberts	John C. Wilson
Jas. F. Hood	F. A. Richardson
G. W. Baird	J. R. Marshall
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Hannis Taylor	A. B. Coolidge
Otis D. Swett	John B. Larner
Oliver Metzertott	Theo. N. Gill
Duane E. Fox	G. W. Littlehales

Frank Boughton Fox



Gentlemen of the Cosmos Club:

In performance of a somewhat belated promise to submit some remarks to my fellow members on a matter that might interest them, I shall say something tonight, as briefly as I may, with reference to the history of the reclamation of the Potomac Flats, with some suggestions as to a wise method for their management.

The subject is of the utmost importance to the country at large, and especially to the people of the District of Columbia. It is intimately connected with the establishment of our National Government, and is almost unique in the world's history. Since Rome was founded by the alleged twin brothers, there had been no instance of the creation by a people in advance of an unoccupied locality as its future seat of government—for the founding of St. Petersburg by the great Czar was only the removal of the capital that was already established to another spot.

So our Constitution (Article I, Section 5) originated a novel provision in Government, when it authorized Congress to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States.

The States of Maryland and Virginia were "the particular States" that ceded to the Government of the United States all the territory thereafter constituting the "ten miles square;" the portion ceded by Maryland being more than two-thirds of the entire area (a large part of it comprehending the Potomac River and the lands beneath its waters), and, after the acceptance of these cessions by Congress, the territory indicated thereby became the seat of the National Government.

At the time of this cession the State of Maryland claimed title and jurisdiction to the Potomac River, with the rights to the soil beneath its waters up to high-water mark on its southern bank. This title was plainly conferred by the words of the grant from Charles the First to Cecilius Calvert, the second Lord Baltimore, of 20th June, 1632; and has been affirmed by repeated adjudications of the courts.*

It may interest such of you as were, in your school days, inclined to be skeptical as to the practical value of the study of Latin, to be reminded of an instance where we became the gainers by a recognition of its grammatical rules. In its English translation the charter described the northern boundary (substantially that which afterward became known as Mason and Dixon's line) as "passing west in a right line by the degree aforesaid unto the meridian of the first fountain of the River Pottomack; thence verging toward the south *unto the urther bank of the said river*, and following *the same*, on the west and south, unto a certain place called Cinquack, situate near the mouth of the said river, where it disembogues into the aforesaid Bay of Chesapeake."

Lord Baltimore contended that these words imperatively carried the meridian line unto the further bank of

*1 Mackay 226, R. R. & Bridge Co. vs. District of Columbia.

the river at high-water mark on the southern or further bank.

The only question that could be made as to the correctness of this construction arose out of the apparent ambiguity of the words "the same," which, it was argued, might refer to "the river" instead of "the bank." But a reference to the original Latin of the charter removed the supposed doubt, for its words are, "*deinde vergendo versus meridiem ad ulteriorem dicti fluminis ripam, et eam sequendo,*" etc.—and as the feminine pronoun "*eam,*" translated "*the same,*" must agree with the feminine ripam, instead of the neuter noun flumen; it demonstrated that the charter underiably declared that the entire southern boundary was to follow *the further bank*, at *high-water mark*, instead of following the middle thread of *the river*.

All these rights to the river and the soil beneath, thus belonging to the State of Maryland, fully devolved by the cession upon the Government of the United States, precisely as they had belonged to Maryland.

It was after the reception of this title that Congress passed the several laws designed to further the improvement of the River Potomac and the subjacent soil, by filling up what were called the Flats; and being apprised that various claims were advanced by individuals to rights therein, it passed the Act of August, 1886, entitled "An Act for protecting the interests of the United States in the Potomac Flats," under which it was made the duty of the Attorney-General to institute suit against all claimants of title to any part of the marshes or flats within the limits of the proposed improvements; to procure an adjudication and settlement of these claims.

In performance of these directions the United States instituted a suit in the Supreme Court of the District of Columbia against Martin F. Morris, and some fifty others, who appeared and presented their claims, upon

a variety of grounds; and were represented by numerous counsel, many of distinction.

The litigation assumed very large dimensions; and the seven printed volumes, and the accompanying maps and charts, with the exhaustive briefs which the industry and ingenuity of counsel presented, will serve to illustrate the history of what may well be classed among the *causes celebres* of our legal history.

These documents it is my desire to place in the Library of the Cosmos Club, and I ask their acceptance by the Club.

The cause came on to be heard before Chief Justice Bingham and Justices Hagner and McComas, and was argued with the fullest allowance of time by some twenty-four counsel.

The opinion, a copy of which is also placed before you, examined every point presented that conflicted with the claims of the United States to its full ownership of the property.

The Decree, bearing date the 17th of October, 1895, in its FIRST paragraph, decided that all manner of claims under what had been called the Kidwell patent were invalid, void, and of no effect, and declared that the said patent was thereby vacated, annulled, and set aside.

By paragraph SECOND it was decided that the claims of each and all of the other parties defendant, set forth in their respective answers, to any rights, titles and interests, riparian or otherwise, in the said land or water, or any portion thereof (except as to the parties and to the extent thereafter to be mentioned in the fourth paragraph of the Decree), were thereby held void.

By paragraph THIRD it was decided that there did not exist (except as aforesaid) any right, title or interest in any person or corporation being a party to the cause, to or in any part of the said land or water, adverse to the complete and paramount rights of the United States to the said land or water; and that the

right and title of the United States (except as aforesaid) to all of the land and water included within the limits of the said improvement of the Potomac River and its Flats, as the said limits were described in the bill of complaint, were thereby held and declared to be absolute in the United States as against all the defendants to said cause, and as against all persons whomsoever claiming any rights, titles or interests therein who might have failed to appear and set forth their claims.

In the progress of the cause the court had observed that the Government authorities had erroneously extended the filling over parts or selvedges of some lots north of Water Street. Although their owners had made no claim in the suit for this act of the Government, the court nevertheless considered they were entitled to receive an indemnification for such injury as they had thus sustained; and with this view it added (*sua sponte*) the FOURTH paragraph to the Decree, declaring such owners were entitled to be indemnified for such impairment of their property rights; and also by paragraph FIFTH, it directed further testimony to be taken to ascertain the facts as to value and ownership of the parts of such lots requisite to a just indemnification in the premises. These provisions were subsequently carried into effect for the benefit of the said lot owners.

On appeal to the Supreme Court of the United States the Decree below was affirmed (with a dissent on the part of two of the learned Justices from one point in the cause), and thus the Decree of the Supreme Court of the District of Columbia in this cause stands settled forever.

It is not too much to affirm that but few causes of greater interest to the public at large, and none of more inestimable consequence to the Government at Washington and to the people of this District, have ever appeared before the courts.

For it had clearly appeared in the progress of the cause that the manifest purpose of numbers of the claimants to the properties involved was to wrest them from the hands of the nation, and apply them, when obtained, to their private advantages, as a giant speculation.

The court had adverted to the evidence that such claims had already been subdivided into thousands of parts, which were being placed on the market and conveyed to purchasers, upon alleged considerations of extremely large sums; and that a syndicate had already been formed which it was hoped would purchase such interests for a price not less than \$1,000,000; and had further remarked, that "for a Government to part with a portion of its domain, beneath or in the waters of a navigable river, to encourage such a scheme, would be a wide departure from the only legitimate purpose for which the sovereign would have the power to relinquish interests it held only in trust for the common use."

The Houses of Congress were evidently impressed with the great importance of preventing, in the future, the consummation of the wrong to the public which had been averted by the decision of the courts; and their subsequent legislation seemed to have been studiously framed with such a purpose, in sympathy with the spirit of the resolution of 1839 that the lands had been ceded to and acquired by the United States for public purposes, and for those only; thus adopting the conclusions of the Supreme Court in *Van Ness vs. The City of Washington*, 4 Peters 281, as expressed by Mr. Justice Story:

"The original owners of the lands must have supposed that Congress would not seek to destroy what its own legislation had created and fostered into being. On the other hand, it must have been obvious, that as Congress must ever have an interest to protect and aid the city, it would for this very purpose be most impolitic and incon-

venient to lay any obstructions to the most free exercise of its powers over it. The city was designed to last in perpetuity—*Capitoli immobile saxum.*”

The Supreme Court of the District, concurring in these just views, remarked:

“The entire history of the District, since the commencement of the Government more than a century ago, exhibits in an unmistakable manner the continuous exercise by the United States of complete dominion and exclusive jurisdiction over the waters of the Potomac and the subjacent soil; always exercised for the benefit of the city as the permanent seat of government of the nation, and in no instance for that of private individuals. Nothing could more conclusively demonstrate that, in the opinion of the successive Congresses, some of them composed in part of the men who had helped to build the nation, these great interests (in the words of the resolution of 1839) had been ‘ceded to and acquired by the United States *for public purposes,*’ and for those only; and all the affirmative evidence afforded by this consistent course of legislative conduct is not opposed by a single legislative or governmental act to the contrary.

“Guided by these considerations in our examination of the testimony and of the entire case, we are of opinion that the cession of the territory and exclusive jurisdiction within the District of Columbia by the State of Maryland, having been accepted by the Government upon the obligation and trust assumed in behalf of the people of the United States to establish there the Capital City which was to become the seat of government of the nation, the rights of property and sovereignty over the River Potomac, with its shores and adjacent lands, devolved upon the United States as the common property of the people, to be used solely for public purposes for the benefit of the seat of government, could not be held as vendible to private persons, and in that

way available as a source of pecuniary advantage to the United States."

In this spirit Congress passed the Act of 3d June, 1897, entitled "An Act declaring the Potomac Flats a public park, under the name of the Potomac Park," in these words:

"Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That the entire area formerly known as the Potomac Flats, and now being reclaimed, with the tidal reservoirs, be and the same are hereby, made and declared a public park, under the name of The Potomac Park, and to be forever held and used as a park, for the recreation and pleasure of the people."

These words operated as a complete and conclusive dedication of the properties described to the public uses, excluding forever all claim of any right in private individuals or corporations inconsistent with this absolute dedication to the public—"to be held forever and used as a park for the recreation and pleasure of the people."

The choice of the name and the contest attending its selection, tended to enforce the idea of the public character. For Congress declined to call it by the humdrum and incorrect name of Riverside, that had already been given to other localities; but, justly influenced by its local surroundings and geographical history, it bestowed upon this lovely domain—but recently a fen and morass, now reclaimed by the skill of the servants of the nation—the beautiful appellation belonging to the grand river whose arms hold it in its embrace on its course, as it flows in tranquil beauty in front of the unpretentious but dignified and revered home of the greatest of mankind, the Father of His Country—POTOMAC—The River of Swans.

Under the intelligent care of the public servants we have seen it growing in beauty and general usefulness, forming what Congress designed it should be, "a park

for the recreation and pleasure of the people," as well of the citizens of the neighboring cities as of the multitudes of people from elsewhere visiting the city.

There is nowhere to be seen, annexed to any other city in the world, so lovely a demesne, fertile as the Delta of the Nile, and enriched by similar agencies of nature.

The difficulty of clearing the most newly reclaimed lands has deferred the complete exhibition of what will be the great result. The eastern part, when intersected by graceful roads, will be bordered at each step by finest floral and arboreal beauties; with tasteful lakes, filled with rare water plants; with the interesting adornments of myriads of novel plants that may easily be introduced from foreign countries, as was formerly practiced by Government officials for the public use.

In process of time these gardens and drives will be a wonder and delight to the crowds who will flock to see them; and will thus become teachers by example.

These and similar advantages will be the result of a compliance with the precept of Congress when it indicated the purposes for which the Potomac Park should be used, with a result that will be the delight and admiration of all.

But I regret to say we have heard a project suggested at variance with these wholesome and acceptable uses, and designed to substitute others that, it seems to me, would be manifestly in opposition at once to the wishes of the original owners of the property out of which the District was formed—of Congress—of the local legislature, and of the great majority of the people of the country, and of the District of Columbia in particular.

The project, as I have heard it described, is to convert the eastern part of the Park into a great football and baseball ground, where vast multitudes are to assemble, who will hold full possession of that part of the Park, to the practical exclusion of every other use except for the playing of such games.

Excellent as well-conducted athletic sports are acknowledged to be, I can see no excuse for such a needless concession in favor of this class of amusements. Certainly there can be no *necessity* for this encroachment upon the people's park; for almost every evening one may see at least three to five such games in full play in the grounds south of the President's house—about three in the Ellipse and perhaps two near the foot of the Monument.

All these games are in progress upon public property, without the slightest charge, as I understand to the gentlemen who, as the newspapers take pains to inform us almost daily, "have signed for \$10,000," or frequently for larger sums, exceeding the salaries of the highest judicial officers in the country; and all this is going on while there are "grounds" scattered all over the city and its neighborhood, where, we are told, many thousand spectators gather at great profit to the corporations or individuals who are operating these money-making schemes.

I understand further that some of these athletes, who contemplate this occupation practically of the eastern part of the Park, complain that they cannot walk all the way from the city to the proposed "grounds," and therefore they plan to obtain a ferry privilege from the neighborhood of Seventh Street to the beautiful grounds of the Park—of course, another scheme for making money by the designers and operators of the said ferry. I fear the athletic exercises are not so strengthening as their votaries assert, since their vigor will not admit of the rather moderate walk they think is too long for them.

I have heard that General Banks, when a lad, was accustomed to walk several miles at nights after his labor in the mill was ended, to learn the lessons that enabled him to become Member of Congress, Governor, etc.; but then perhaps he had not "signed" for \$10,000, or been "bought out" by one game from another.

We are told 40,000 people frequently assemble to watch such games. Suppose these plans succeed—what chance will the other people of the United States (not "signers" or stockholders) have of using the Potomac Park? Many of those other people are taxpayers here; some live many miles away; but they would like occasionally to have the benefit of the Park which was designed to be secured to them by the law. How are they to obtain the enjoyment of what is plainly their right if this rapacious scheme should prevail? For these 40,000, with the "signers," etc., must be furnished with great buildings to accommodate their great crowds. Who are to provide all these receptacles; and who are to receive the charges for renting out the seats; and in what part of the Acts of Congress referred to is authority given to occupy the Park with the monstrous wooden sheds to accommodate these thousands?

The United States was supposed to have obtained a great victory for good order when it was believed the court's decision would exclude the Ferris wheel and its numerous congenors from the Park; but if this land is now to be turned over to the support of the football, baseball and ferry scheme, the supposed victory would prove to have been worse than a defeat;—like the disastrous success that befel Pyrrhus, of Epirus.

And who are to keep the peace at those assemblages?—for it is said there have sometimes been differences of opinion among the parties interested.

I have suggested these difficulties among many others that are obvious; for my present purpose is simply to

call public attention, without further delay, to this rapacious project and to beg all who hear me to enter their protests against so dangerous an intrusion upon the rights of the citizens.

Many people of this city, female as well as male, are advanced in years. They, for the most part, may be assumed to be well-behaved people, who are not promoters of troublesome crowds in the streets; but who are engaged in useful industries, and who pay their taxes. Some of them are told by their physicians that their health requires they should occasionally take exercise in the public parks, and some of them even take the liberty to take the advice. What are these people to do when they desire to visit the Potomac Park, when the bleaching boards shall have been erected, and the ferries are in operation? The "signers" and the twenty persons who alone play the games, as I understand (nine on each side and the umpire), may get along pretty well, if they have "signed off" for the indefinite thousands; but some of us cannot "sign off." What are they to do when they find these lands, especially dedicated for "the recreation of the people," thus monopolized by a favored game?

Rome, at one time, we are told, was a magnificent and formidable city—the terror of its opponents; but, as history informs us, after the great empire had introduced the vices of the conquered people of the East with the prisoners brought to swell the triumphs; and had decided to employ those captives to fight its battles, while the Romans contented themselves with feasting on costly foods, luxuriating in incessant baths, and constant attendance at the circuses, and at the savage contests of the gladiators, the eternal cry of the idle populace was for feasts and play—"*panem et circenses*"—bread and the circuses—and when that day came, then Rome fell forever.

St. Paul's account of the indolent Corinthians proves how extensively the effeminate example of the degener-

ate Romans had spread: "The people sit down to eat and drink, and rise up to play."

I am glad to be informed that our excellent Secretary of War has refused his assent to a surrender of part of the Potomac Park to the occupation by the scientists of the Smithsonian Institution for experiments with aeroplanes, a scheme indefinitely more meritorious. If this is so, which I am informed is correct, there can be no doubt that the football and ferry plan will fall through.

But it is well to consider that the price of liberty is eternal vigilance.

June 8, 1914.



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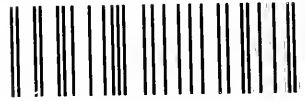
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